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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-818

GILBERT LUNA AND LARRY KOPP,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Gilbert Luna, and Larry Kopp, by and through their attorneys, Neil H. Fink and N. C. Deday LaRene, and Sienna (Schneider) LaRene petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit vacating the order of the United States District Court for the Eastern District of Michigan ordering certain wiretap evidence suppressed in connection with a prosecution for violation of the Federal Extortionate Extension of Credit Act, 18 USC §891 *et seq*

## OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals was decided and filed November 7, 1975 and is reprinted in full as Appendix A hereto.

## JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals was filed November 7, 1975. The jurisdiction of this Court is invoked under 28 USC §1254(1).

## QUESTIONS PRESENTED

I.

What standards should a Federal Court apply when confronted with Affidavits for search warrants which are alleged or found to contain misrepresentations of fact?

II.

What standards of review are appropriate for a Federal Appellate Court in the context of an appeal based upon alleged error in making mixed findings of law and fact upon a pretrial Motion in a criminal case?

## STATEMENT OF THE CASE

On March 2, 1973, the Honorable Lawrence Gubow, Judge of the United States District Court for the Eastern District of Michigan, signed an Order authorizing the interception of wire communications pursuant to 18 USC §251 (a). This Order authorized the interception of communications of a number of persons named and unnamed, concerning alleged violations of 18 USC §§659 and 371, regarding thefts from interstate shipments. One of the telephones which was authorized to be intercepted was that of Petitioner Gilbert Luna. The Order was predicated upon an application by the Detroit Strike Force, United States Department of Justice Organized Crime and Racketeering Section, and an Affidavit in support thereof subscribed and sworn to that day by Special Agent Edward R. Schley of the Federal Bureau of Investigation. The Affidavit in turn was largely predicated upon information supplied by a confidential informant, identified in the Affidavit as FBI-1, and recounted information regarding a series of thefts and disbursals of merchandise from freight terminals at Detroit Metropolitan Airport and the general contours of a "theft operation".

Petitioner Luna was mentioned a number of times in the Affidavit; however, the central allegation of the Affidavit as to Luna was found on Page 8 thereof, and, as sworn to by the affiant, was as follows:

> FBI-1 told me that Hines [a central figure in the alleged operation] told him that Joseph "Joe" Tocco and Gilbert Luna provide the means of payment to the men actually performing the thefts and received money from the sale of the freight and mer-

chandise stolen, as well as some of the stolen freight and merchandise.

The Court-authorized interception permitted by the terms of the March 2, 1973 order was effectuated. Petitioner Luna was not indicted for any violation named in the Application and Order but, rather, on June 28, 1973, was indicted along with the Petitioner Kopp and two others, for various violations of the Federal Extortionate Extension of Credit Act (18 USC §§891 *et seq.*) (Two of the Defendants, but not the Petitioners, were also charged with misprision of felony, 18 USC §4, and conspiracy to commit that offense), in light of conversations overheard in the course of the interception.

On February 19, 1974, Petitioners Luna and Kopp filed with the District Court a supplemental Motion to suppress wiretap evidence and for an evidentiary hearing, alleging that they had learned that the confidential informant upon whose information the Affidavit was based, identified in the Affidavit as "FBI-1", was in fact one Steven Filkovich and attaching an Affidavit of Filkovich in which Filkovich then maintained that he had never made the statements regarding Gilbert Luna which were attributed to him in the Affidavit. The evidentiary hearing prayed for in the Motion was held on February 20, 1974.

At the evidentiary hearing, the Government acknowledged that Steven Filkovich was indeed FBI-1, and the testimony of three witnesses was taken: that of Steven Filkovich, called by the Petitioners, who denied having made the statement in the Affidavit regarding Gilbert Luna, and the two FBI agents who worked principally upon the investigation which led to the procurement of the wiretap order, Bruce Masters, and the affiant, Edward Schley.

The Government offered, in addition to the testimony of the Agents, the investigatory notes (a series of FBI inter-office memoranda) which the agents prepared in connection with their dealings with Filkovich (FBI-1), which were admitted as Exhibits in the hearing.

At the conclusion of the hearing, the Trial Court took the matter under advisement, and, on the morning of February 22, 1974, rendered an oral Opinion from the bench, granting the Motion of the Petitioners and suppressing the evidence obtained through the wiretap. Judge Gubow, summarizing the testimony taken at the hearing, found that, in considering the investigatory notes introduced by the Government, and the testimony of the Government's agents, the inescapable conclusion was that what the agents had done was to draw their own conclusions regarding the role that Petitioner Luna was allegedly playing in the "theft operation" and to present those conclusions, in the guise of factual assertions attributed to the informant, even though the informant had not himself made those direct factual assertions. Judge Gubow wrote:

> The Court agrees with the Government's contention that an Affidavit need not present a mirror image of an informant's exact words or the exact language of a memorandum. However, the Government misperceives the issue when it suggests that the Affidavit is supported by various facts and permissible inferences which led the Agents to their own conclusion that Luna was financing the thefts. If the Affidavit had stated that the Agents had pieced together various bits of information and concluded that Luna was financing the thefts, then the Court, in considering the application could have evaluated the Agents' conclusions and inferences to

determine if they supported a finding of probable cause.

However, the Court was not called upon to make such an evaluation. The Affidavit informed the Court that statements had been made to the Agent by an informant, and to the informant by an alleged conspirator with first-hand knowledge of the crime, these statements as represented, were conclusive of the question of probable cause to believe Luna was financing the thefts. They made it unnecessary for the Court to evaluate the reasonableness of an Agent's inferences and conclusions derived independently of the statements. To argue, as the Government does, that such inferences and conclusions were reasonable and would themselves support a probable cause finding is in effect to seek the Court's *ex post facto* blessings on a search already concluded. Obviously, the Fourth Amendment requires more.

On the question of whether Luna was financing the thefts, the crucial portion of Schley's Affidavit was to the effect that Hines had so stated to Filkovich. Yet, there was no evidence elicited at the hearing to challenge Filkovich's unequivocal denial that such a statement had been made. Neither Masters nor Schley offered independent oral testimony that such statements had been made, and even they could find nothing in the written memoranda to support Schley's assertion that the statements had been made. We are compelled to conclude that the statement at Page 8 was false.

• • •

> While we would hesitate to characterize the falsity of Page 8 as an intentional effort to deceive the Court, neither can it be reasonably characterized as mere negligence. The false statement is one of specificity and detail about which the Government could not have been confused. There is nothing in the record or in reason to indicate the Government might not have known whether or not the statements recounted on Page 8 of the Affidavit had in fact been made. The evidence indicates that the statements were not made. The Court concludes that the misrepresentation was knowing and not inadvertent. It could not have been otherwise.

Judge Gubow's Opinion from the bench is set forth in full as Appendix B, *infra*. At the conclusion of the proceedings, the Court inquired of the Government whether it was ready to proceed to trial (which had originally been set for February 19, 1974). The Government indicated that, with the suppression of the wiretapped evidence, it would be unable to proceed "in a manner which would warrant proper prosecution", and, upon the Government's request, and its representation that it would file Notice of Appeal within thirty days, the Trial Court adjourned the matter without date, so that the Government might perfect its appeal, and enlarged all Defendants (who had previously been held for their inability to furnish bond) upon personal bond.

On March 13, 1974, the Government filed a Motion for Rehearing which was utimately denied by the Trial Court. The Trial Court's Opinion denying the Motion for Rehearing is appended hereto as Appendix C. That Opinion, after reviewing its previous findings, notes again that "the

conclusion is inescapable that, at the very least, the Agents acted recklessly."

The Government duly appealed the suppression Order and the Order denying the Motion for Rehearing to the United States Court of Appeals for the Sixth Circuit. As framed before that Court, the issues upon appeal revolved around the propriety of the Trial Court's findings regarding the significance of the testimony offered by the Government witnesses at the suppression hearing. The Government argued that the Trial Court misperceived and mischaracterized testimony of the investigating agents, while the Petitioners contended that the Trial Court's findings of fact in regard to the import of the testimony could not be held to be "clearly erroneous". In the course of oral argument before the Court of Appeals, that Court, noting the recent rash of decisional activity among the various Circuits (see, *e.g., United States v Thomas*, 489 F 2d 664, CA 5, 1973), *United States v Marihart*, 492 F 2d 897 (CA 8, 1974); *United States v Carmichael*, 489 F 2d 983 (CA 7, 1973); *United States v Belculfine*, 508 F2d 58 (CA 1, 1974)) with regard to the question of the allegation and proof of false statements in search warrant affidavits, asked for Supplemental Briefs from the parties, so that, in the event of a remand, it might issue authoritative guidelines in regard to what standards of law the District Court might apply to its factual standings. Supplemental Briefs were, in fact, supplied by the parties, and on November 7, 1975, the Court of Appeals filed an Opinion vacating the Order of Suppression and remanding for further proceedings.

With respect to the issue originally framed by the parties, the Court wrote that it found "a decided conflict between the testimony of Filkovich and that of the FBI agents"—but did not address in detail the arguments of

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the parties regarding the significance of the testimony adduced at the hearing. However, the Court went further, and dealt at some length with the question of what standards should be applied by a District Court when false statements are alleged to be present in an Affidavit, and in what circumstances the presence of false statements in an Affidavit would compel the suppression of the evidence seized under a search warrant issued thereupon. The decision in the Sixth Circuit Court is reproduced herein as Appendix A.

## REASONS FOR GRANTING THE WRIT

### I.

**THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS REPRESENTS A MARKED DEPARTURE FROM EXISTING LAW, AND CRYSTALIZES A DEEP AND GROWING CONFLICT BETWEEN THE LAW OF THE VARIOUS CIRCUITS WITH RESPECT TO FALSE STATEMENTS IN A SEARCH WARRANT AFFIDAVIT OR APPLICATION FOR A WIRETAP ORDER, AND MARKEDLY AND IMPROPERLY DENIGRATES IMPORTANT FOURTH AMENDMENT PROTECTIONS; THIS COURT SHOULD GRANT A WRIT OF CERTIORARI SO THAT IT MAY SET DOWN AUTHORITATIVE STANDARDS FOR THE GUIDANCE OF THE FEDERAL JUDICIARY IN DEALING WITH ALLEGATIONS AND PROOF OF MISREPRESENTATIONS IN A SEARCH WARRANT AFFIDAVIT, AND ANSWER THE QUESTION UNRESOLVED IN RUGENDORF v UNITED STATES, 376 US 528 (1964).**

In *Rugendorf v United States*, 376 US 528, 531-32 (1964), this Court noted that it has never passed directly on the extent to which a Court may permit a challenge to an Affidavit underlying a search warrant where the Affidavit establishes probable cause upon its face. Neither, of course,

has the Court passed upon the question of what consequences might follow when a facially sufficient Affidavit is shown, through whatever procedural device, to be based upon or to contain false statements which might, to some degree, undercut its showing of probable cause. However, the area has been a ripe one for litigation in the Courts of Appeals.

Thus, a large number of decisions hold that where search warrant affiadvits have been founded upon misrepresentations, a Court must read the Affidavit purged of its misrepresentative portions and, when the residuum is insufficient to support a finding of probable cause, evidence seized under the warrant premised upon the misrepresentative affidavit must be suppressed. See *e.g. United States v Jones,* 475 F 2d 723 (CA 5, 1973); *United States v Upshaw,* 448 F 2d 1218 (CA 5, 1971); *United States v Pearce,* 275 F 2d 318 (CA 7, 1960); *United States v Harwood,* 470 F 2d 322 (CA 10, 1972); *United States v Henderson,* 17 FRD 1 (CA DC 1954); *United States v Nagle,* 34 F 2d 952 (ND NY 1929). For the most part, these decisions, and decisions like them, do not concern themselves with the state of mind, as it were, with which the misrepresentations were made — that is, whether they were made "knowingly," "intentionally", "negligently," "innocently," or the like. Rather, the great majority of the decisions simply assume, almost without deciding, that, at the very least, it would be improper to permit misrepresentations, however made, to be weighed in the warrant-issuing process. Likewise, for the most part, the earlier decisions do not confront the question of what remedy, if any, is appropriate, where the misrepresentation is not crucial to the establishment of probable cause (or, as the conventional vocabulary has come to call it, "material"—in the sense of "crucial," and not merely "relevant").

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However, a number of recent appellate pronouncements have significantly broadened the inquiry, and have attempted to lay down broad guidelines to deal with the entire range of possible misstatements or misrepresentations —whether "intentionally," "recklessly," "negligently," or "inadvertently" made, and whether "material" or not to the establishment of probable cause.

Thus, in *United States v Carmichael*, 489 F 2d 983 (CA 7, 1973), the Seventh Circuit held that "deliberate" misrepresentations in a search warrant affidavit, whether crucial to the establishment of probable cause or not should result in the suppression of evidence seized under the resulting search warrant, but that misrepresentations which are "negligent" only should not result in the suppression of evidence, even when crucial to the establishment of probable cause. Beyond "deliberate" misrepresentations, the *Carmichael* Court held only misrepresentations "recklessly" made, and crucial to the establishment of probable cause, should also result in the suppression of evidence.

In *United States v Thomas*, 489 F 2d 664 (CA 5, 1973), the Fifth Circuit somewhat modified the *Carmichael* formulation, and held that affidavits containing misrepresentations are invalid and evidence secured thereunder must be suppressed if the misrepresentation was committed "with an intent to deceive the magistrate," whether or not the misrepresentation is "material" (crucial) to the showing of probable cause, or, if made "non-intentionally," but the "erroneous statement is material to the establishment of probable cause for the search."

In *United States v Marihart*, 492 F 2d 897 (CA 8, 1974), the Eighth Circuit compared the *Carmichael* and *Thomas* formulations, and announced that that Circuit would follow the *Carmichael* tests.

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In *United States v Belculfine,* 508 F 2d 58 (CA 1, 1974), the First Circuit added yet another wrinkle. Discussing both *Carmichael, Thomas,* and other authorities, the First Circuit concluded that the "material"-"immaterial" distinction, (that is, whether or not a statement was a "but for essential" of probable cause) is an insufficiently precise analytical device, and expanded the applicability of the remedy of suppression to situations in which "knowing" misstatements of "significant" facts, which were capable of changing a "marginally adequate affidavit into a solidly persausive one."

The decision of the Sixth Circuit Court of Appeals in the case at bar formulates a rule which is different from any of the above formulations. The Court held that suppression would be appropriate only where the affiant made "knowing use of a false statement" "with intent to deceive the Court," or when the affiant "recklessly aserts a statement essential to the establishment of probable cause."

Petitioners contend that the formulation of the Sixth Circuit is an unduly restrictive one, and significantly denigrates important Fourth Amendment protections. Moreover, it is clearly in conflict with all of the decisions referred to above emanating from other Courts of Appeals. Not only does it represent a clear departure from the earlier case law, which would appear to strike down affidavits where false statements, however made, were crucial to the establishment of probable cause, but, perhaps more significantly, it represents the latest development in an ever-broadening rift between the various Circuits which have spoken to the question of misrepresentative affidavits in the last two years. It will be noted that the five recent decisions which have addressed the question of misrepresentative affidavits *(Carmichael, Thomas, Marihart, Belcufine,* and *Luna)* in the last two years, the five Circuits

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have adopted four different formulations. Simply stated, Petitioners contend that it is necessary and appropriate that this Court lay down an authoritative single standard, guideline, or test to be applied across the board by the Federal judiciary, and thereby end the welter of decisional inconsistencies in this important area of Federal criminal law.

The basic thrust of the constitutional warrant preference is that the independent judgment of a magistrate is preferable to that of officers engaged in the "often competitive business of ferretting out crime." *Jones v United States,* 362 US 257 (1960). It is thus the policy of the law that officers investigating suspected criminal activity, in possession of information which moves them to want to conduct a search, should present the information at their disposal upon which their belief that a search is necessary or appropriate is based to a neutral and detached judicial officer, so that the conclusion as to whether a search is necessary or appropriate may be independently drawn, and the inferences suggesting the necessity or appropriateness of an intrusion into a citizen's sphere of privacy may be drawn independently by such a judicial officer. Inasmuch as it is the judicial officer's judgment which is the *desideratum* of the warrant process, and the bottom line of protection to individual privacy afforded by the constitutional preference for warrants, it is clear that the integrity of the process and the protection which it affords, can only be maintained if some controls the imposed to insure that the magistrate is supplied with a truthful and accurate account of the information upon which the law enforcement officers seeking authorization to search premise or legitimate the intrusion represented by the search. If the state of facts known to the officers seeking judicial authorization to search is misrepresented to the magis-

trate, the protection offered by the warrant process and the judicial review of the sufficiency of the facts known to the officers to support the proposed intrusion is rendered nugatory.

The Exclusionary Rule, which has long been seen as the handmaiden of the constitutional guarantee of privacy expressed by the Fourth Amendment, was well explained by Mr. Justice Frankfurter in *Jones v United States,* 362 US 257, 261 (1960) as follows:

> The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudiced. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment, is a means for making effective the protection of privacy.

In their original Brief Petitioners reviewed the most recent Federal Appellate pronouncements regarding factual misrepresentations in Affidavits for search warrants: *United States v Carmichael,* 489 F 2d 983, (CA 7, 1973); *United States v Thomas,* 489 F 2d 664 (CA 5, 1973); *United States v Marihart,* 492 F 2d, 897 (CA 8, 1974); and *United States v Belculfine,* 508 F 2d 58 (CA 1, 1974). These decisions focus, in varying ways, with differing emphases, upon two factors: the state of mind with which the misstatement was made, and the role which the misstatement played in the establishment of probable cause in the affidavit.[1] Al-

[1] Indeed, in *United States v Bowling,* 351 F 2d 236, 242 (CA 6 1965), implicitly recognizes these two factors as decisionally significant in the resolution of the question which was expressly left open in *Bowling*: how to deal with facially sufficient but possibly false search warrant affidavits, the question which the Court in the instant case indicated its interest in reaching.

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though none of these decisions provide a formulation which appears to deal with all of the variants of the misrepresentative affidavit problem, and while Petitioners do not endorse any one of the varying formulations completely, it does seem that the two factors identified by these decisions, and by the various commentators who have spoken to the question[2] are indeed the appropriate ones to be considered in arriving at a rule to deal with the problem of these concerns—how to effectively deter law enforcement misconduct, and safeguard the integrity of the judicial process, form, Petitioners submit, the dual touchstones of the formulation of any rule regarding how to deal with misrepresentative search warrant affidavits.

Petitioners submit that an intentional misrepresentation should always result in suppression, and that a Court need not pause to consider the role which the intentional misrepresentation played in the establishment of probable cause, or whether probable cause might have been made out, well or poorly, without the misrepresentation, since an intentional falsity in a sworn affidavit is such an imposition upon the integrity and dignity of the judicial process, and upon the singularly important right of privacy protected by the Fourth Amendment, that to hold otherwise would seem the greatest disservice imaginable to the spirit of the Exclusionary Rule.

As to other than intentional misrepresentations, Petitioners would suggest that distinction between representations which are "crucial" or not "crucial" to the establish-

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[2] See, *e.g.*, Note, the Outwardly Sufficient Search Warrant Affidavit: What If It's False? 19 UCLA Law Review, 96 (1974); Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harvard Law Review, 825 (1971); Mascolo, Impeaching the Credibility of Affidavit for Search Warrants: Piercing the Presumption of Validity, 44 Conn. Bar Journal, 9 (1970).

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ment of probable cause (in the conventional terminology, "material" or "immaterial") is not sufficient, but would urge upon this Court in the formulation of the First Circuit in *Belculfine, supra,* which recognizes that while not "crucial" to the establishment of probable cause, a statement, later shown to be false, which may be seen as playing a "significant" role in the probable cause formulation, even if not a "crucial" one, should be treated differently from one which is merely "trivial."

It is little enough to require that a law enforcement officer, seeking a court-authorized intrusion into a constitutionally protected sphere of privacy, use reasonable care in insuring that the affidavit accurately reflects his own state of knowledge, particularly when the factual representation is critical to, or significant in the establishment of probable cause. Certainly, at a very minimum, the affiant should have some regard for whether or not the statements made by him in his affidavit are indeed truthful and accurate, particularly in so far as they relate to important aspects of that affidavit's showing of probable cause. Tests of "ordinary prudence" or "due care and circumspection" are regularly applied by courts in dealing with far less significant, and far more mundane kinds of activities, such as the driving of an automobile, and it seems to this writer that courts which acquire information and exposure to the way in which criminal investigations are conducted can well be expected to apply such tests to law enforcement conduct as it emerges in the course of hearings on misrepresetnative affidavits. Thus, Petitioners formulation, which would suppress the fruit of misrepresentative search warrant affidavits, when the misrepresentation was the product of recklessness or negligence and the matter which was misrepresented was either material or significant to the affidavit's showing of probable cause, seems both logical and salutory, as well as eminently workable. If it is

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not unreasonable to expect that drivers of automobiles can, by the ordinary doctrine of law under which they are held civilly responsible for negligence in the operation of a motor vehicle, or recklessness therein, it would seem that we might reasonably expect to enforce standards of reasonable care and heedfulness upon law enforcement officers seeking judicial approval of intrusions upon constitutionally protected spheres of privacy, and deter deviations from such standards of care by means of the Exclusionary Rule.[3]

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[3] As one commentator notes, "those errors due to carelessness or haste by deponents are likely to decrease if it is known that careless errors may invalidate an otherwise permissible search." Note, the Outwardly Sufficient Search Warrant Affidavit: What If It's False? 19 UCLA Law Review, 96, 117-118 (1974). The *Carmichael* court noted that "negligent misrepresentations are theoretically deterrable", 489 F2d *supra*, at 989, but felt that no workable test appeared for determining "whether an officer was negligent or completely innocent in not checking his facts further." That Court held, therefore, that in no case would a negligent misrepresentation justify the invalidation of a search, but would supply evidence where a "reckless" misrepresentation was "material" to the showing of probable cause. It strikes this writer that the *Carmichael* court's difficulty in formulating a "workable" test for determining negligence might have been the result of that Court's apparent failure to adequately define whether it was dealing with falsity in "primary" or "secondary" facts, that is to say, the Court apparently never made the distinction, suggested above by the Appellees herein between falsity as to the state of the affiant's knowledge and falsity of the underlying facts asserted. *Carmichael,* like the instant case, involved representations as to the state of knowledge of an affiant who had been dealing with an informant. However, the alleged misrepresentations in *Carmichael* involved both the state of knowledge of the affiant and the correctness of basic, underlying facts, (about the informant), which might or might not, have been known to the affiant, but which were not necessarily matters asserted to be within his knowledge. Thus, *Carmichael,* involved both misrepresentations of state of the affiant's knowledge and misrepresentations, allegedly, of ultimate facts (what may be referred to as "secondary" facts). Moreover, the *Carmichael* court went far beyond the scope of the questions presented by the facts of that case, in attempting to derive something like an across-the-board formulation for dealing with misrepresentations, whatever their character, and, for all that appears from the opinion, whether they would

(continued on next page)

There will certainly always be cases in which an affidavit is found to be misrepresentative, but the misrepresentation was the product not of negligence, and it cannot be said that reasonable care to verify the truthfulness or accuracy of the affidavit was not used by the affiant. Certainly, it is meaningless to think of "deterring" reasonable care, since it is, at the very least, reasonable care that the courts would wish to encourage. Thus, the deterrence rationale of the Exclusionary Rule would not seem to support a formulation which call for the exclusion of evidence acquired as a result of a search warrant issued upon affidavit, which, although misrepresentative, nevertheless was assembled and prepared with due care and heedfulness for its accuracy. On this basis, then, one might conclude, as have the bulk of the courts and commentators that innocent misrepresentations should not call for suppression. However, there is an overriding concern for the integrity of the judicial process which pervades the entire area of Fourth Amendment law. In the spirit of this concern, it would seem unhealthy, and improper, to admit evidence

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relate to the state of the affiant's knowledge or the truthfulness of representations made to the affiant (or, generally, facts alleged, but not alleged to be within the affiant's knowledge). Thus, the *Carmichael* court's difficulty in the formulation of a test would determine whether an affiant had adequately "checked" his information, might well be taken as referring to a reluctance on that Court's part to extending the scope of an inquiry as to misrepresentations to a general review of what might ultimately turn out to be simply the question of whether, in a particular case, an affiant was justified in feeling his informant to be reliable. When the distinction is drawn between misrepresentations as to the affiant's own state of knowledge, and falsity in the underlying facts, and the inquiry as to misrepresentation is confined to the accuracy of the representations of the affiant's state of knowledge, and not the accuracy of the facts upon which the affiant relies, the inquiry is simplified, and, as outlined above, it seems both germane and simple enough to inquire into whether or not, in the preparation of the affidavit, the affiant used reasonable care to insure its accuracy, at least as to the state of his own knowledge.

against a defendant when that evidence was secured by means of a falsehood even if the falsehood was not the product of improper conduct on the part of law enforcement. Petitioners submit that falsehood, even innocent falsehood is a pollutant in the waters of the law, and the concern for the purity of those waters which this Court must feel, should move the Court to hold that the direct products of falsity will not find harbor in our courts. Accordingly, Petitioners suggest that when a search warrant, and the fruits of that warrant, are directly and immutably attributable to even an innocent falsehood, the courts, out of concern for the purity and integrity of the judicial process, should hold that the search warrant is invalid and the evidence therefore excludable. To translate this suggestion into the definitional structure adopted herein, Petitioners submit that when an innocent misrepresentation is material to the establishment of probable cause—that is that without the misrepresentative allegations, probable cause could not have been found—evidence secured under a resulting search warrant should be suppressed. There is some rough justice in not invoking the sanctions of exclusion, even where the innocent misrepresentation was "significant" in the context of the affidavit, since, the product of the search warrant cannot be said to have been a direct and unquestionable result of the falsehood. However, as noted above, when the intrusion and the evidence is a direct and unquestionable product of falsity, that evidence should be suppressed.

In tabular form, then, the formulation proposed by the Petitioners herein may be represented as follows:

WHETHER EVIDENCE SECURED UNDER A SEARCH WARRANT OR INTERCEPTION ORDER PREMISES UPON AN AFFIDAVIT INVOLVING MISREPRESENTATIONS AS TO THE AFFIANT'S STATE OF KNOWLEDGE IS TO BE SUPPRESSED

Role of the Misrepresentation in The Affidavit

| State of Mind, or "Culpability" With Which the Misrepresentation is Made | Material | Significant | Trivial |
|---|---|---|---|
| Innocently | Yes | No | No |
| Negligently | Yes | Yes | No |
| Recklessly | Yes | Yes | No |
| Intentionally | Yes | Yes | Yes |

However, whatever formulation this Court might see fit to adopt in the event that it consents to hear the instant case upon its merits, Petitioners would simply submit that some fixed, defined and consistent formulation is infinitely preferable to the confused, confusing, and contradictory variety of formulations which the Circuit Courts of Appeals have in fact propounded, and that, given the importance of the question involved, both as a matter of Fourth Amendment law, and in terms of the consistent and rational functioning of the Federal judiciary, it is important that this Court propounded such a formulation at this time.[4]

[4] Also involved, of course, in the question presented by the instant case is the subsidiary inquiry as to when a hearing upon an allegation that a facially sufficient affidavit is in fact false might be had. Although in the case at bar the Government did not oppose the hold-

(continued on next page)

## II.

**THIS COURT SHOULD LAY DOWN AUTHORITATIVE GUIDELINES FOR THE REVIEW OF DISTRICT COURT FINDINGS OF LAW AND FACT IN PRETRIAL MOTION HEARINGS IN CRIMINAL CASES, AND SHOULD REVERSE THE ORDER OF THE SIXTH CIRCUIT VACATING THE ORDER OF SUPPRESSION, BECAUSE THAT DECISION DOES NOT GIVE PROPER DEFERENCE TO THE FINDINGS OF THE TRIAL COURT.**

The Trial Court, in the case at bar, having heard the testimony of the informant to the effect that he did not make the statements attributed to him in the Affidavit, and having heard the testimony of the Government agents, found that the testimony of the agents, when reviewed in connection with the investigative memoranda which were admitted as Government exhibits, justified at best the conclusion, not that it was their testimony that one informant had made the statements attributed to him directly, but, rather, that the informant had made other statements which, when pieced together by the agents, and when read in light of the inferential abilities of the agents, resulted in the inclusion in the Affidavit of the ultimate statements regarding the involvement of Petitioner Luna in the alleged theft operation, and that such statements in the Affidavit

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(continued from preceding page)

ing of an evidentiary hearing, the Court of Appeals did in fact address itself to that question. If this Court felt that the question is ripe for adjudication in the context of the instant case, Petitioners would suggest that a simple and appropriate standard would be that an evidentiary hearing should be held when a Motion, duly supported by affidavits, makes out a *prima facie* showing which, if upheld by the testimony at the proposed hearing, would mandate suppression of the evidence under whatever formulation this Court might propound for the invalidation of warrants on account of misrepresentations.

represented, *according to the testimony of the agents,* the agents' conclusions and not a recounting of the statements made by the informant. Thus, the Trial Judge held that no conflict between the testimony of the agents and that of the informant necessary to the ultimate decision of the Motion was presented, and that it was therefore not necessary for the Trial Court to rule upon the relative credibility of the agents and of the informant, since, even when considering the Government agents' testimony alone, the Trial Court's findings in regard to the significance of that testimony were to the effect that, even under the testimony proffered by the Government, the Affidavit was misrepresented. (See Appendices B and C).

The Government argued on appeal that the Trial Court misapprehended the significance of the following testimony with regard to the crucial allegation on Page 8 of the Affidavit:

> Q. To the best of your knowledge, is this allegation as contained in the Affidavit based on the information furnished you on the interviews conducted on February 2, and February 12?
>
> A. Do you mind if I look at the notes again?
>
> Q. No.
>
> A. The information set out in the Affidavit was information I obtained on these dates, yes.

The Government noted that Judge Gubow, in his opinion from the bench, quoted this colloquy verbatim, but premised error on its assertion that "he completely dismissed it as evidence". The Government maintained that "Judge Gubow had no right to refuse to consider" Agent Masters' ultimate statement set forth above. The Government correctly noted that Judge Gubow found, as a matter of fact,

that "with respect to the statement on page 8 of the Affidavit, Agent Masters offered no oral testimony independent of the written memorandum". However, the Government wholly and completely misconceived Judge Gubow's opinion, and grossly distorted its thrust when it stated that Judge Gubow's "refuse(d) to consider" or "completely dismissed" the colloquy, and the answer in formulating his findings. Rather, what Judge Gubow did, as he was required, as the finder of fact, to do, was to determine the thrust, import and significance of this bit of evidence (in the context of all of the testimony and exhibits presented to him) in regard to the issue before him. His opinion makes clear that the significance which he did attach to this series of questions and answers, in the context of the totality of testimony, was not that Masters, by his answer, was saying that, as a matter of independent recollection, he could assert that Filkovich told him that Hines had told him that Luna occupied the stated role in the "theft operation"; but, rather that the answer in question instead buttressed the ultimate conclusion that the statement on page 8 regarding Luna's role in the alleged "theft operation" did not have its basis in a relayed admission against penal interest by Hines, but rather, was an inference and conclusion drawn by the Agents.

Not only is Judge Gubow's finding in this regard wholly supported by the record before him, but, perhaps more significantly, Judge Gubow was in a uniquely advantageous position to make the factual determination which he did.

With respect to the colloquy in question, as well as with respect to all of the testimony taken, the trial judge was able to hear and observe the witnesses, and to draw from his observation the kinds of inferences which are uniquely within the province of the fact-finder to make. Thus, with

respect to the set-out colloquy, he could observe the witness' behavior when the question was asked, while the notes were examined and when the answer was given; he could note the tone of voice, the hesitancy, or the inflections with which the witness gave his answer; he knew the length of time which the witness spent in examining the memorandum, and could draw conclusions regarding the witness' reliance upon the memorandum from the length of time given to their consideration, as well as all other relevant factors concerning the witness' bearing and demeanor as the questions were posed and the answer given, which the printed record can never reflect. He heard all of ths testimony, and was in a uniquely favorable position to draw inferences and conclusions from the witness' repeated reliance upon the notes, the way in which the witness' answers track the language of the memoranda, and, of course, throughout the hearing, all of the intangible factors regarding the role which the memoranda played in the Government's presentation of its proofs.

There is no reason to believe that Judge Gubow gave anything less than such full consideration to his findings. At the time that he rendered his opinion from the bench, he had had the matter under advisement for a day and a half. He made explicit reference to the colloquy which the Government bases its allegations of error upon, and even went so far as to read into the record the full text of the questions and answers here under discussion; notwithstanding the fact the testimony had not been transcribed yet indicating both that he had gone to great lengths to make a careful review of the testimony presented, and (perhaps more significantly) that as the finder of fact, he found the colloquy to support his ultimate conclusion.

In his opinion from the bench, after quoting the questions and answers hereinabove referred to, Judge Gubow noted that:

> Cross examination disclosed that the information in his notes which Masters seized upon as supporting the page 8 statement was information which he claimed led him to infer and conclude that Luna was "financing" the thefts.

The Court of Appeals stated only: "We agree with the desirability of remand for resolution of credibility, since we find a decided conflict between the testimony of Filkovich [the informant ]and that of the FBI agents."

The above illustrates the need for this Court to propound authoritative guidelines for the review of what are essentially mixed findings of law and fact made by Trial Courts in the context of the hearing of Motions prior to trial. Although all parties to the appeal in the case at bar seem to adopt (either explicitly or implicitly) a "clearly erroneous" standard for such review, the Court of Appeals did not, at any point, deliniate what standard it felt it was applying, and the decision of the Court of Appeals seems clearly at odds with the "clearly erroneous" standard, which this Court has explained, in *Guzman* v *Pichirilo,* 369 US 698, 702 (1962), as prohibiting an Appellate Court from upsetting a Trial Court's factual findings "unless it is left with a definite and firm conviction that a mistake has been committed."

Petitioners submit that, if the Court of Appeals was indeed reviewing the decision of the Trial Court under a "clearly erroneous" standard, then the decision of the Court of Appeals is itself "clearly erroneous" since the finding of the District Court, essentially factual in nature,

is manifestly supported by the record in the Trial Court, and it would have been impossible for the Court of Appeals to have a "definite and firm conviction" that the Trial Court erred in its findings of fact. If, however, the Trial Court applied some other, unstated, standard, then the grant of a Writ of Certiorari, Petitioners submit, is appropriate so that this Court may instruct the Sixth Circuit in the proper standards for review in cases such as the one at bar.

Indeed, this Court has apparently never spoken to the question of what standards or by what standards or guidelines a Federal appellate court should be guided in the review of mixed questions of fact and law raised in the context of motion practice in Federal criminal cases. In light of the ever-burgeoning numbers of evidentiary hearings which are being held in the District Courts in connection with pretrial motions in criminal cases, the promulgation of such guidelines would be an important and significant exercise of this Court's general supervisory power over the Federal criminal jurisprudence. Moreover, since the resolution of questions raised in the context of pretrial motions are often determinative of the outcome of the whole case (as is true in the case at bar), the establishment of definitive guidelines would have significant impact upon the overall pattern of resolution of Federal criminal cases.

In short, Petitioners submit that the decision of the Court of Appeals is manifestly in error in failing to give appropriate deference to the findings of the Trial Court and bespeaks a need for guidance by this Court as to the appropriate standards of review for the decisions of Federal trial judges upon the hearing of Motions in Federal criminal cases.

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## CONCLUSION

It is therefore respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the important questions posed by the case at bar.

Respectfully submitted,

FINK & LaRENE
NEIL H. FINK
N. C. DEDAY LaRENE
SIENNA (Schneider) LaRENE

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## APPENDIX A

## DECISION OF THE COURT OF APPEALS

No. 75-1084

| | |
|---|---|
| United States of America,<br>*Plaintiff-Appellant,*<br>v.<br>Gilbert Luna, Larry Cobb a/k/a Larry Kopp, Francisco Sotello, Peter K. Kolleck,<br>*Defendants-Appellees.* | APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division. |

Decided and Filed November 7, 1975.

Before Phillips, Chief Judge, Weick and Edwards, Circuit Judges.

Edwards, Circuit Judge. This is a government appeal from the suppression of wire tap evidence which the United States desired to offer in its prosecution of Gilbert Luna and three other defendants. The four had been indicted on four counts charging conspiracy to extort money from one William Stewart. The government contends that evidence of this extortion scheme was discovered as a result of a duly authorized and legal interception of communications through Gilbert Luna's telephone under an order dated March 2, 1973, issued by a District Judge in the Eastern District of Michigan, Southern Division. After originally denying defense motions to suppress the evidence derived from the telephone intercept order, the Dis-

trict Judge subsequently took testimony on a supplemental motion to suppress and thereafter granted that motion in a bench opinion.

In his suppression opinion, the District Judge identified as false, portions of a particular paragraph of the affidavit which pertained to information concerning thefts at the Detroit Metropolitan Airport and the subsequent fencing of the materials stolen there.

The paragraph principally in dispute reads as follows:

> FBI-1 told me that Hines told him that Joseph "Joe" Tocco and Gilbert Luna provide the means of payment to the men actually performing the thefts and receive money from the sales of the freight and merchandise stolen, as well as some of the stolen freight and merchandise.

This paragraph was one sentence of a 15-page affidavit filed by an FBI agent which dealt at length with allegations concerning a major theft ring operated at the Detroit Metropolitan Airport and with the fencing of the stolen goods procured. Even more detailed information (particularly in relation to Luna) alleged that the thieves were paid in narcotics by the persons who received and fenced the solen goods. In these memoranda Luna was said to be supplying narcotics to Hines.

At the hearing on the motion to suppress, defendants produced a person named Filkovich whom they claimed was FBI-1. Subsequently this was conceded to be true by the agents involved. Filkovich testified that he had informed about the theft ring and had said that Hines was financing it, but had not said that Luna was. After hearing Filkovich and the two FBI agents involved who also

testified on this score, and after inspecting the agents' field notes, the District Judge concluded, "There was no evidence elicited at the hearing to challenge Filkovich's unequivocal denial that such a statement had been made," and "We are compelled to conclude that the statement at page 8 was false."

The District Judge did not pass on the credibility of Filkovich or the FBI agents. He found the statements in the quoted paragraph were false and "material," and held that any material false statement in the affidavit required suppression of the evidence seized under the intercept order. He declined to find out that "the falsity was an intentional effort to deceive the court," but concluded that "the misrepresentation was knowing and not inadvertent."

After a motion for rehearing supported by government filed affidavits was denied, the government appealed, claiming that the case should be remanded for further testimony and for a square resolution of the credibility of the witnesses.

We agree with the desirability of remand for resolution of credibility, since we find a decided conflict between the testimony of Filkovich and that of the FBI agents.[1] But we also feel that before remand this Circuit should define the legal standards to be applied.

This case presents squarely the problem of whether or not an attack upon a search warrant affidavit can be made, alleging not that it was facially insufficient to supply prob-

[1] The government has now moved to remand this case for reopening of the record to take additional evidence on this score. Said motion is hereby referred to the District Court for consideration on the remand hereinafter provided for.

ble cause, but that when made it was actually false or fraudulent, or both. This issue was noted by the United States Supreme Court, but not decided, in *Rugendorf* v. *United States,* 376 U.S. 528, 531-33 (1964), and was referred to similarly by this court in *United States* v. *Bowling,* 351 F.2d 236, 241-2 (6th Cir. 1965), *cert. denied,* 383 US 908 (1966).

It appears that since 1965 other circuit opinions have divided somewhat as to under what circumstances false representations in an affidavit should lead to suppression of evidence seized under a search warrant. See *United States* v. *Belculfine,* 508 F.2d 58 (1st Cir. 1974); *United States* v. *Marihart,* 492 F.2d 897 (8th Cir.), *cert. denied,* 419 U.S. 827 (1974); *United States* v. *Thomas,* 489 F.2d 664 (5th Cir. 1973); *United States* v. *Carmichael,* 489 F.2d 983 (7th Cir. 1973).

In the *Carmichael* case cited above, the Seventh Circuit held:

> We now hold that a defendant is entitled to a hearing which delves below the surface of a facially sufficient affidavit if he has made an initial showing of either of the following: (1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material. See generally United States v. Dunnings, 425 F.2d 836, 840, (2d Cir. 1969), certiorari denied, 397 U.S. 1002, 90 S. Ct. 1149, 25 L. Ed. 2d 412; United States v. Halsey, 257 F. Supp. 1002 (S.D. N.Y. 1966); Kipperman, "Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence," 84 Harv. L. Rev. 825 (1971).
>
> However, once such a hearing is granted, more must be shown to suppress the evidence. Evidence should

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not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful. A completely innocent misrepresentation is not sufficient for two reasons. Most importantly, the primary justification for the exclusionary rule is to deter police misconduct (see Kipperman, *supra,* at 831, and cases cited), and good faith errors cannot be deterred. Furthermore, such errors do not negate probable cause. If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then even if mistaken he has probable cause to believe that a crime has been committed. Such errors are likelier and more tolerable during the early stages of the criminal process, for issuance of a warrant is not equivalent to conviction.

Negligent misrepresentations are theoretically deterrable, but no workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further. We therefore conclude that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation. Even where the officer is reckless, if the misrepresentation is immaterial, it did not affect the issuance of the warrant and here is no justification for suppressing the evidence. Arguably, the same conclusion could be reached as to deliberate but immaterial misrepresentations. However, we conclude that if deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing.

*United States* v. *Carmichael, supra* at 988-99. (Footnote omitted.)

This view is squarely adopted by the Eighth Circuit in the *Marihart* case cited above, *supra* at 900. See also *United States* v. *Bulculfine, supra.*

The Fifth Circuit has phrased this matter somewhat differently:

> Therefore, we hold that affidavits containing misrepresentation are invalid if the error (1) was committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause; or (2) made non-intentionally, but the erroneous statement is material to the establishment of probable cause for the search.
>
> *United States* v. *Thomas, supra* at 669.

In this circuit's *Bowling* case (cited above), dealing with unintentional error, we said:

> While we have noted that the intent to deceive the magistrate charge was never presented to the District Judge, he did have clearly before him the factual errors in the affidavit upon which appellant now relies. Under this circumstance, we read the denial of the motion to suppress evidence as a holding that there was probable cause for the warrant and that errors in the affidavit were either immaterial or unintentional, such as are produced by drafting "by non-lawyers in the midst and haste of a criminal investigation." United States v. Ventresca, *supra,* 380 U.S. at 108, 85 S. Ct. at 746.
>
> *United States* v. *Bowling, supra,* at 241-242. (Footnote omitted.)

In *Bowling* we also noted:

> The Supreme Court has also made clear that highly technical attacks upon affidavits and warrants where sought and used are not to be encouraged.
>
> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." United States v. Ventresca, *supra,* 380 U.S. at 108, 85 S. Ct. at 746.
>
> *Id.* at 237.

The purpose of the Fourth Amendment is, wherever pratcical, to involve a judicial officer (not directly charged with the duty to investigate or prosecute) in the decision to search any constitutionally protected area. Congress, in turn, has recognized the special sensitivity of telephonic searches and has even more narrowly limited the instances where a search can lawfully be made without judicial warrant. The Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970).

The exclusionary rule laid down in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), serves these constitutional purposes by seeking to deter police misconduct and to safeguard the integrity of the judicial process. But it by no means contradicts the practical interpretation of the Fourth Amendment mandated by *United States* v. *Ventresca*, 380 U.S. 102 (1965).

In our present case the basic constitutional purpose was complied with in the sense that there was extensive law enforcement investigation, and a 15-page affidavit representing probable cause was presented before a magistrate with the request for the search warrant. The warrant was issued before the interception.

Nonetheless, it must be recognized that law enforcement agents presenting evidence to magistrates could make a mockery of the magistrate's role if, in the necessarily ex parte proceeding, they could freely employ false allegations in order to secure the warrant. The same could likewise be true if the agents could, with impunity, draft affidavits with utter recklessness as to truth or falisty. In either instance there would be a lack of good faith in the performance of the agent's duty to the judicial officer.

There are two circumstances which we believe authorize the impeachment of an affidavit which on its face is sufficient probable cause for issuance of the warrant. The first of these consists of knowing use of a false statement by the affiant with intent to deceive the court. This is true even if the statement can be said to be immaterial to the issue of probable cause. In our judgment such perjury must lead to suppression of the evidence in order to prevent fraud upon the judicial process.

The second circumstance arises when a law enforcement agent recklessly asserts a statement essential to

establishment of probable cause and the charge is subsequently made that the statement is both false and recklessly made. In alleging recklessness, the movant must offer affidavits 1) that the statement sought to be attacked was false when made, and 2) that when made the affiant did not have reasonable grounds for believing it. At a hearing on such a charge, it will be important for the District Judge to determine whether means had been available to the agent to establish the truth or falsity of the statement without such delay as would defeat a legitimate law enforcement purpose.

On the other hand, we do not believe that good faith error in a carefully prepared search warrant affidavit should be held to require suppression of evidence even where the erroneous allegation was essential to establishment of probable cause. As we see the matter, the suppression rule can hardly be expected to prevent human error. It should be employed to strike down perjury and to promote careful police work.

Although what we have said to this point is sufficient for purposes of the remand previously ordered, two comments on the District Judge's present rulings may prove helpful.

First, the allegation attacked as false said in part "Joseph (Joe) Tocco and Gilbert Luna provide the means of payment to the men actually performing the thefts." In his two opinions the District Judge referred to this as affiant's assertion that "Luna was financing the thefts." This appears to be an error. In testing the actual words of the affidavit for either perjury or recklessly tendered mistake, we think that in the context of the total affidavit they must be judged on the basis of an assertion that FBI-1 had informed that Tocco and Luna were supplying the means with which the thieves were paid.

Second, it appears that the District Judge's view of the affidavit may have been affected by the fact that only one affidavit was prepared, that it was signed by FBI agent Schley, the agent in charge of the case, and that it incorporated what the informant had told agent Masters, as well as what he told Schley, without informing the magistrate as to this last fact. The present record shows that FBI-1's information relating to this topic was furnished only to Agent Masters. But unless the hearing on remand develops some indication that this misstatement was made in bad faith with the intention to mislead the magistrate, we do not believe it can be a basis for suppression. On somewhat different facts, *Ventresca* recognized that "observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965).

The order of suppression appealed from is vacated and the case is remanded for further proceedings consistent with his opinion.

## APPENDIX B

### TRIAL COURT'S OPINION FROM THE BENCH, FEBRUARY 22, 1974

* * * * *

(98) Well, the Court has before it the Defendant Gilbert Luna's motion to suppress evidence obtained by the Government in the course of a Court ordered wire tap of his telephone. A motion requesting the same relief was heard and denied by this Court in an opinion and order rendered on January 25, 1974. The instant motion was prompted by the defendant's recent discovery of the identity

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of the heretofore confidential informant designated in the affidavit as FBI One, whose information provided the basis for the Government affidavit submitted in support of its application for the wire tap order.

The defendant alleges in his motion that the Government affidavit contains false allegations of material fact in that it attributed to the informant statements which the informant did not make.

A hearing was held on the motion, testimony was taken, arguments were heard and briefs of counsel were subsequently submitted. On the basis of all of this, the Court makes the following findings and conclusions.

The disputed affidavit is that of Edward R. (99) Schley, Special Agent of the FBI. Three portions of the affidavit are attacked. The first is at page 5 of the affidavit. There the affiant states and I quote:

> "FBI One told me that the participants in the Airport freight stealing and receiving and reselling operation were Jack Urban Hines, Joseph 'Joe' Tocco, Gilbert Luna, Bruce William Edwards, Walter W. Martin, James E. '90' 'Jim' Berendt, Frank Matteini, 'Wayne), Edward George 'Charmin' Hardie, John Curtis and others not known to him."

The second is at page 8 and there the affiant states and I quote:

> "FBI One told me that Hines told him that Joseph 'Joe' Tocco and Gilbert Luna provide the means of payment to the man actually performing the thefts and receive money from the sales of the freight and merchandise stolen, as well as some of the stolen freight and merchandise."

The third is at page 11. And there the affiant states and I quote:

> "Source advised that on February 10 and 11, 1973, he was at Hines' apartment and observed on several occasions Hines dial (100) telephone number (313) 287-6574 and overheard Hines converse with Gilbert Luna. During these calls, FBI One said he heard Hines and Luna discuss the availability of stolen coats and stated that he would be over to visit Hines about the stolen coats. Luna and Hines also discussed the possibility of obtaining more coats and other type of clothing from the Detroit Metropolitan Airport in the near future.
>
> FBI One further advised that shortly after these conversations, Gilbert Luna appeared at Hines' residence and in a conversation on February 10, 1973, Luna remarked to FBI One that the leather jacket he was wearing was stolen from Detroit Metropolitan Airport and cost him $60 from Hines."

Now, it is not disputed that FBI One is in fact Steven Filkovich. Filkovich testified that he had not made any of these statements to Special Agent Schley or to Special Agent Masters or to anyone else in the FBI.

Now, Agent Bruce Alan Masters, who inter- (101) viewed FBI One or Steven Filkovich and who worked together with Agent Schley in the investigation and in the preparation of the affidavit, testified that Filkovich had indeed made the statements attributed to him at page 5 and at page 11 of the affidavit. Documentary evidence was received which purported to represent the Agents' written recollection of interviews with Filkovich, prepared contemporaneously with the interviews. These memoranda can be read in part inferentially as lending credence to Master's testimony recollecting Filkovich's statements as represented on page 5 and 11 of the affidavit.

With respect to the statement on page 8 of the affidavit, Agent Masters offered no oral testimony independent of the written memorandum. When asked if the statement on page 8 was based on information furnished during the interviews with Filkovich—and I might quote from the record. The question regarding the statement on page 8 was as follows and I quote:

> "Q. To the best of your knowledge, is the allegation as contained in the affidavit based on information furnished you on the interviews conducted on February 2 and February 12?"

The answer by Agent Masters to that question, which was (102) directed to him by Mr. Cook, the question that I just read, was, and I quote:

> "A. Do you mind if I look at the notes again?
> Q. No.
> A. The information set out in the affidavit was the information I obtained on these dates, yes."

Cross examination disclosed that the information in his notes which Masters seized upon as supporting the page 8 statement was information which he claimed led him to infer and conclude that Luna was "financing" the thefts. He conceded that there was nothing in his notes to support the statement that Filkovich told Schley that Hines had said that Luna was financing the thefts.

Agent Schley also testified. Although the affidavit is his and Filkovich allegedly spoke to him, Schley offered no testimony, either in oral or documentary form, to support the statements in the affidavit or to rebut the denials of Filkovich.

Thus presented, the issue with respect to the possibility of false statements at pages 5 and 11, turns on the relative

credibility of Filkovich on the one hand and Masters and Schley on the other. In the Court's opinion, however, this issue of credibility need (103) not be resolved because the falsity of the page 8 statement stands undisputed by any evidence solicited at the hearing and itself renders the Schley affidavit fatally defective.

The Court agrees with the Government's contention that an affidavit need not present a mirror image of an informant's exact words or the exact language of a memorandum. However, the Government misperceives the issue when it suggests that the affidavit is supported by various facts and permissible inferences which led the Agents to their own conclusion that Luna was financing the thefts. If the affidavit had stated that the Agents had pieced together various bits of information and concluded that Luna was financing the thefts, then the Court in considering the application could have evaluated the Agents' conclusions and inferences to determine if they supported a finding of probable cause.

However, the Court was not called upon to make such an evaluation. The affidavit informed the Court that statements had been made to the Agent by an informant and to the informant by an alleged conspirator with first hand knowledge of the crime. These statements as represented were conclusive of the question of probable cause to believe Luna was financing the thefts. They made it unnecessary for the Court to evaluate the reason- (104) ableness of an Agent's inferences and conclusions derived independently of the statements. To argue, as the Government does, that such inferences and conclusions were reasonable and would themselves support a probable cause finding is in effect to seek the Court's post facto blessings on a search already concluded. Obviously, the Fourth Amendment requires more.

On the question of whether Luna was financing the thefts, the crucial portion of Schley's affidavit was to the effect that Hines had so stated to Filkovich. Yet there was no evidence elicited at the hearing to challenge Filkovich's unequivocal denial that such a statement had been made. Neither Masters nor Schley offered independent oral testimony that such statements had been made and even they could find nothing in the written memoranda to support Schley's assertion that the statements had been made. We are compelled to conclude that the statements at page 8 was false.

The Government has not disputed the materiality of the statement on page 8, nor has the Government disagreed that where false misrepresentations of a material fact are made in the affidavit, suppression of the evidence derived therefrom is the proper remedy. There is recent authority for the proposition that suppression is inappropriate where the false statement is (105) made in good faith or negligently. And I cite here United States v Carmichael at 14 Criminal Law 2128, a Seventh Circuit, 1973 case, which, by the way, did not involve wire tapping but principle which I just enunciated, which the Court believes would apply here as well. There the court stated at page 2129 and I quote:

> "Evidence should not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful."

While we would hesitate to characterize the falsity at page 8 as an intentional effect to deceive the Court, neither can it be reasonably characterized as mere negligence. The false statement is one of specificity and detail about which the Government could not have been confused. There is nothing in the record or in reason to indicate that the

Government might not have known whether or not the statements recounted on page 8 of the affidavit had in fact been made. The evidence indicates that the statements were not made. The Court concludes that the misrepresntation was knowing and not inadvertent. It could not have been otherwise.

Now, the Court is mindful that suppression is a drastic remedy. However, we deal here with more than mere procedural niceties. It has been recognized (106) that the right of a citizen to be free from unreasonable surveillance of his private speech is as worthy of protection under the Fourth Amendment as his right against unreasonable entry into his home. United States vs. United States District Court, 407 US 297 at page 313. That such rights are fundamental and deeply cherished in our system of government hardly needs stating here. Government dishonesty in its approach to the safeguards established for the protection of such rights cannot be overstated as a menace which demands deterrence. We deal in this case with dishonesty striking at the very heart of the Court's finding of probable cause, at least with respect to the justification for intercepting Defendant Luna's phone. The materiality of the misrepresentation is manifest. Its gravity, it seems clear, calls for suppression. The Court therefore is going to grant the Defendant Luna's motion to suppress.

I might point out here that the Court, I, as a former U.S. Attorney, am aware of all that goes into the preparation of the affidavits and the warrants and so forth and presentation to the Court and I therefore, with this opinion, am not here pointing the finger at any one person or two persons but recognize what goes into all of this in its preparation.

That leaves us with the evidence gained (107) through the wire tap suppressed.

## APPENDIX C

### OPINION AND ORDER DENYING MOTION FOR REHEARING

(U. S. District Court—Eastern District Of Michigan—Southern Division)

(Filed September 16, 1974)

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| United States of America, Plaintiff, v Gilbert Luka, Larry Cobb, Francisco "Pancho" Sotello and Peter R. Kolleck, Defendants. | Criminal Action No. 49331 |

On February 22, 1974, this court granted Defendant Gilbert Luna's motion to suppress evidence obtained by the Government in the course of a court-ordered wiretap of his telephone. The court's decision, as more fully set forth in a bench opinion of that date, was based on the court's finding that the Government's affidavit, submitted in support of its application for the wiretap order, contained false allegations of material fact. The court now has before it the Government's motion for rehearing filed pursuant to Rule IX-A of the Rules of the United States District Court for the Eastern District of Michigan.

The fatal defect in the affidavit was at page 8 wherein the affiant, Edward R. Schley, Special Agent of the F.B.I., stated that the informant told Schley that Hines told him that Defendant Gilbert Luna was financing the thefts which were the subject of the investigation. The informant,

subsequently identified as Steven Filkovich, testified and denied having made the statement attributed to him. Agent Schley and Agent Bruce Alan Masters, who worked together with Agent Schley in the investigation and in the preparation of the affidavit, both testified at the hearing. Agent Schley offered no testimony to support the statment in the affidavit or to rebut the denials of Filkovich. Agent Masters had to make reference to his written recollections of the interviews with Filkovich, prepared contemporaneously with the interviews. These memoranda, while perhaps supporting inferences which might lead the Agents to their own conclusion that Luna was financing the thefts, contained nothing to support the statement at page 8 of the affidavit that Hines had told Filkovich that Luna was financing the thefts. The court concluded that the statement was false and had been knowingly made. While the court declined to characterize the false statements as an intentional effort to deceive the court, the conclusion is inescapable that, at the very least, the Agents acted recklessly.

In support of its motion, the Government has offered two affidavits. The first is that of Agent Masters. He states that he now has an "independent recollection" that Filkovich told him that Luna was providing Hines with narcotics "and that he, Filkovich, believed that Luna, in turn, was receiving stolen merchandise from Hines." The second affidavit is by Norman Simon, Supervisory Special Agent of the F.B.I. He states that Masters told him of a conversation with Filkovich in which Filkovich informed him that Luna was fencing stolen merchandise for Hines. The Government states that these matters were inadvertently omitted from the Government's presentation at the hearing.

It is recognized by both sides of the dispute that the question of reopening a closed hearing is addressed to the sound discretion of the trial court. Defendant has raised serious questions of the propriety of reopening a hearing where, as here, the issue on rehearing was directly addressed by both parties in the original hearing. While the court recognizes the weight of Defendant's argument, it is unnecessary to resolve the issue because the proffered testimony, even if given weight over Filkovich's denial, would not cure the objectionable factual defects in the Affidavit. In the first place, the defective affidavit was that of Agent Schley, not Agent Masters. The passage on page 8 which was found to be erroneous was Schley's sworn statement of what he had been told by Filkovich. The affidavits offered to cure the defect disclose nothing of what Filkovich told Schley and refer instead to statements by Filkovich to Masters. In the second place, the affidavits offered to cure the defect do not disclose any basis for concluding that Hines told Filkovich that Luna was financing the thefts, as the Schley affidavit stated. Thus, the principle defect remains uncured.

The Government also argues that the court misapplied the law with respect to the effect of a misrepresentation of a fact in an affidavit presented by the Government in support of a search warrant or wiretap application. The Government, in this respect, changes its position from what it argued at the hearing. It is now the Government's position that the warrant should be upheld because, when stripped of the false material, it still supports a finding of probable cause. Although it is by no means certain that the Schley affidavit, when stripped of its misrepresentations, would still support a finding of probable cause to support a wiretap on Luna's telephone, this, too, is a matter which the court need not determine because the

Government concedes that any misrepresentation, if recklessly made, compels suppression of the evidence. This is the rule of law stated in *United States v. Carmichael,* 489 F.2d 983 (7th Cir. 1973), a case relied on by this court in its bench opinion on February 22, 1974, and in *United States* v. *Thomas,* 489 F.2d 664 (5th Cir. 1973), a case which followed the decision in *Carmichael* and which the Government relies on here. Since the court has found that the falsehood in the Schley affidavit was recklessly made, it follows that the evidence obtained during the course of the wiretap must be suppressed regardless of the independent sufficiency of the remainder of the affidavit.

It is noted that the circumstance of a hasty criminal investigation, held in this circuit as excusing unintentional errors in affidavits, is not present in this case. See *United States* v. *Bowling,* 351 F.2d 236, 241-242 (6th Cir. 1965).

The motion for rehearing is Denied.

It Is So Ordered.

/s/ Lawrence Gubow.
U. S. District Judge.

Dated: September 16, 1974.

# In the Supreme Court of the United States

OCTOBER TERM, 1975

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NO. 75-818

GILBERT LUNA AND LARRY KOPP, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals exceeded its proper scope of review in vacating the district court's order granting suppression of evidence and that the court of appeals prescribed an erroneous legal standard to be applied by the district court on remand if warranted by its findings of fact.

Petitioners were indicted in the United States District Court for the Eastern District of Michigan for conspiring to use and for using extortionate means to collect a $63,900 debt, in violation of 18 U.S.C. 894. Prior to trial, the district court suppressed evidence of these offenses that had been obtained during a court-authorized wire interception (Pet. App. B).[1] On the government's appeal,

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[1]The district court also denied the government's motion for rehearing (Pet. App. C).

the court of appeals vacated the suppression order and remanded for further proceedings in accordance with its opinion (Pet. App. A; 525 F.2d 4[1]

1. As part of an investigation into the large-scale theft of property from interstate carriers in the Detroit area, the government obtained court authorization on March 2, 1973, to monitor a telephone used by petitioner Luna, who the government had probable cause to believe was involved in the theft operation (C.A. App. 34-39).[2] The government's wiretap application was supported by a 15-page affidavit of Special Agent Edward R. Schley of the F.B.I., who relied principally on information supplied by a confidential informant, "FBI-1" (C.A. App. 18-33).

On the day before trial was to have commenced, petitioners filed a motion to suppress all evidence derived from the interception, claiming that the identity of the informant had been discovered and that the informant denied giving the F.B.I. agents any information about petitioner Luna's involvement in the thefts. Attached to this motion was the affidavit of Steven Filkovich, who claimed to be the informant "FBI-1" (C.A. App. 43-46). After the government acknowledged that Filkovich was the confidential informant referred to in Agent Schley's affidavit, the district court conducted an evidentiary hearing on the motion, at which Filkovich and the F.B.I. agents involved in the investigation testified.[3]

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[2]"C.A. App." refers to the Appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[3]The government did not object to the district court's decision to conduct this hearing. Thus, the questions whether a defendant is entitled to an evidentiary hearing to challenge the validity of a search warrant affidavit sufficient on its face and, if such a hearing may properly be held, what preliminary showing the defendant must make, are not presented here. See *Rugendorf* v. *United States*, 376 U.S. 528, 531-532.

Petitioner Luna had been mentioned in three portions of the wiretap affidavit, at pages 5, 8, and 11 (see Pet. App. B 39-40). Filkovich claimed at the hearing that the information attributed to him in the agent's affidavit was true, except for the mention of petitioner Luna's name (C.A. App. 66-73, 85, 92). F.B.I. Agents Schley and Bruce Masters testified, however, that the information in the affidavit regarding petitioner had been supplied to them by Filkovich (Pet. App. B 40-41; C.A. App. 145).

The district court recognized that the testimony concerning the statements about petitioner Luna on pages 5 and 11 of the wiretap affidavit was conflicting, but ruled that the credibility of Filkovich did not have to be determined "because the falsity of the page 8 statement stands undisputed by any evidence solicited at the hearing and itself renders the Schley affidavit fatally defective" (Pet. App. B 42). The court then suppressed all evidence gained through the wiretap, holding that without the statement on page 8 of the affidavit there was no probable cause to monitor petitioner Luna's telephone (Pet. App. B 43-44).[4]

The Sixth Circuit reversed the suppression order and remanded for further proceedings, stating that "we find a decided conflict between the testimony of Filkovich and that of the FBI agents" as to the statements about petitioner Luna on page 8 of the affidavit and that the district court had erred in failing to resolve the conflict (Pet. App. A 31).

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[4]Although the district court suppressed the wiretap evidence against petitioner Kopp as well as against petitioner Luna, petitioner Kopp was not the target of the wiretap and none of his conversations was intercepted. Hence, he lacks standing to contest admission of the evidence gained as a result of the interception. *Alderman* v. *United States*, 394 U.S. 165, 171-176.

2. Petitioners contend (Pet. 21-26) that the court of appeals exceeded its proper scope of review in vacating the district court's findings. However, these findings were clearly erroneous, because in making them the trial court apparently failed to consider testimony of one of the F.B.I. agents. When asked about the statement regarding petitioner Luna on page 8 of the affidavit, Agent Masters had testified at the suppression hearing that "[t]he information set out in the affidavit was information I obtained" from Filkovich (C.A. App. 111-112). Since the district court had stated that Filkovich's testimony to the contrary was "undisputed" (Pet. App. B 42), its findings based on the "undisputed" evidence were clearly in error and the court of appeals properly remanded for resolution of the conflicting testimony.[5]

Petitioners' claim (Pet. 23) that the district court implicitly resolved the conflict in testimony against the government and that the court's statement that there was "no evidence" (Pet. App. B 43) should be construed to mean that there was "no credible evidence" is unpersuasive. This strained interpretation is not supported by the district court's opinion, in which the court repeatedly stressed that the government had offered no evidence to contradict Filkovich's material testimony and that no issue of credibility therefore had to be determined (Pet. App. B 41-43). If the district court had merely

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[5]While this case was pending in the court of appeals, the government filed a motion for remand to the district court for further evidentiary proceedings, attaching an affidavit of Filkovich in which he affirmed that the information regarding petitioner Luna in the Schley affidavit attributed to him was accurate and stated that he had lied at the suppression hearing because he was in fear of his personal safety (see App., *infra*). The court of appeals declined to rule on this motion to reopen the record, but referred it to the district court for consideration on remand (Pet. App. A 31, n. 1).

disbelieved the government's evidence, it certainly would have included that express finding in its detailed discussion.[6]

3. Finally, petitioners contend (Pet. 9-20) that the court of appeals established an incorrect legal standard in advising the district court of the proper rule to apply if, after resolving the credibility question, the court finds that there were misrepresentations in the wiretap affidavit. However, the question raised by petitioners is not ripe for review by this Court because the absence of valid fact findings in the present record makes the issue "too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's and Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224. See also *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327.

If, as is likely in view of the recent recantation by Filkovich, the district court concludes that there were no misrepresentations by the F.B.I. agents, then the issue of course need not be reached. See *United States* v. *Belculfine*, 395 F. Supp. 7, 8 (D. Mass.), affirmed, C.A. 1, No. 75-1213, decided December 30, 1975. If the district court finds that there were misrepresentations, then the record will present concrete facts and findings—especially as to the crucial issues of materiality and intent

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[6]In addition, the court of appeals mentioned two other significant errors in the district court's ruling that should be corrected on remand (Pet. App. A 37-38).

—fairly reviewable by the court of appeals rather than, as now, varying hypothetical fact patterns. (see Pet. 20).[7]

It is therefore respectfully submited that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

FEBRUARY 1976.

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[7] In each of the four court of appeals cases cited by petitioners as evidence of a "welter of decisional inconsistencies" (Pet. 13) among the circuits, as well as in the instant case, the court's discussion was far broader than that necessitated by the particular facts. This, rather than an irreconcilable conflict in theory, may in large measure explain the differing approaches to the problem of misrepresentations in search warrant affidavits.

## APPENDIX

*IN THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

UNITED STATES OF AMERICA,
APPELLANT,

Docket No. 75-1084

*v.*

GILBERT LUNA,
LARRY COBB, a/k/a LARRY KOPP,
FRANCISCO SOTELO, AND
PETER K. KOLLECK,
APPELLEES.

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### *AFFIDAVIT*

STEVEN D. J. FILKOVICH, being duly sworn, states:

1. I was called as a witness for the defense during a pretrial hearing in this criminal matter on February 20, 1974.

2. During my testimony at this hearing and while under oath, I was asked whether I had ever made a statement to Bruce Masters or Edward Schley of the Federal Bureau of Investigation that Hines had told me that Joe Tocco and Gilbert Luna provided the means of payment to the men performing certain thefts and whether Tocco and Luna received money and goods in exchange for such payment. I admitted having made a similar statement, but denied making such a statement specifically about Gilbert Luna.

3. I denied providing this information contained at page eight (8) of the Affidavit of Edward R. Schley.

dated March 2, 1973, at the said pretrial hearing because I was, at the time of my testimony, in the greatest fear for my personal safety were I to have testified truthfully under oath.

4. I have read the Affidavit of Edward R. Schley, dated March 2, 1973, and in particular the information attributed to me as FBI-1 on pages 5, 8 and 11 of the said Affidavit and affirm that I did provide this information to Edward R. Schley and that such information was truthful and a part of my personal knowledge.

/s/ STEVEN D. J. FILKOVICH

STEVEN D.J. FILKOVICH

Sworn and Subscribed to
before me this 29th day of September, 1975.

/s/ JOHN L. NEWCOMER

JOHN L. NEWCOMER, *Notary Public*
Oakland County, Michigan

My Commission expires: March 19, 1979.